Lethal Weapon: Will Tenth Amendment Challenges Kill the Brady Act?

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I. INTRODUCTION

In the last few decades, crime and violence in the United States have evolved into a serious epidemic affecting every American.[1] Fear and outrage have captured the American mood, and the citizenry has begun to demand swift and effective action from its elected officials to contain this abhorrent behavior and return the streets to law-abiding citizens. While everybody seems to agree that the present situation needs rectification, determining the proper approach has been the subject of endless debate and discussion. The issue of gun control as a method of reducing the ever present violence in our society is perhaps one of the most hotly debated subjects in crime prevention.[2]

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[1] H.R. REP. NO. 344, 103d Cong., 2d Sess., at 8 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1984, 1985 (citing U.S. DEP'T OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES 1992, at 18; U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1992, at 292–371; Wendy Max & Dorothy Rice, *Shooting in the Dark: Estimating the Cost of Firearm Injuries*, HEALTH AFFAIRS (Winter 1992)).

[2] Due to its complexity and sensitivity, the issue of gun control as an effective method of crime prevention is beyond the scope of this Note. Numerous sources are available for exploration into the gun control debate. *See generally* Thomas M. Moncure, Jr., *The Second Amendment Ain't About Hunting*, 34 HOW. L.J. 589 (1991) (arguing that in attempting to defend "assault weapon" bans on the grounds that such weapons have no gaming purpose, such advocates miss the point for which the Second Amendment was passed—to protect citizens from an oppressive government); Mark Udulutch, *The Constitutional Implications of Gun Control and Several Realistic Gun Control Proposals*, 17 AM. J. CRIM. L. 19 (1989) (pushing several gun control proposals for adoption); Sanford Levinson, Comment, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1991) (emphasizing the need for legal academics to take the Second Amendment more seriously when constructing their "maps" of constitutional structure); Robert A. O'Hare, Jr. & Jorge Pedreira, Note, *An Uncertain Right: The Second Amendment and the Assault Weapon Legislation Controversy*, 66 ST. JOHN'S L. REV. 179 (1992) (arguing that much of the constitutional debate surrounding gun control measures only serves to mask political ulterior motives); Jay R. Wagner, Comment, *Gun Control Legislation and the Intent of the Second Amendment: To What Extent Is There an Individual Right to Keep and Bear Arms?*, 37 VILL. L. REV. 1407 (1992) (exploring the historical antecedents to the Second Amendment to argue that the Second Amendment was intended to protect an individual's right to keep

Government interference with a citizen's right to operate, possess or own a firearm sharply divides the electorate, and as a result, a political showdown has resulted with both sides armed with an arsenal of legal and constitutional arguments. In an attempt to respond to the ever-increasing cries of help from the communities victimized and held hostage by the onslaught of crime and violence, the United States Congress waded through the morass of debate and conflict and enacted the Brady Handgun Violence Prevention Act[3] (Brady Act), as an amendment to the Gun Control Act of 1968[4] (Gun Control Act).

This Note will explore recent challenges to the constitutionality of the Brady Act through an analysis of the present Supreme Court interpretation of the Tenth Amendment and an exploration of the recent decisions evaluating the challenges raised by local law enforcement officials and the National Rifle Association. Part II of this Note will set forth a brief history and explanation of the Brady Act, as well as the law enforcement official's required duties under the legislation. Additionally, Part II will explore the points of contention between the federal government and law enforcement officials. In Part III, this Note will examine the evolution of the Supreme Court's Tenth Amendment analysis, and will present and explore the Court's recent interpretation in *New York v. United States*.[5] Part IV will examine the validity of the Brady Act in light of present Tenth Amendment jurisprudence and modern statutory construction.

II. THE BRADY HANDGUN VIOLENCE PREVENTION ACT

A. *The Brady Act*

On November 30, 1993, Congress enacted the Brady Act[6] in an effort to

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and bear arms).

[3] Pub. L. No. 103-159, 107 Stat. 1536 (codified at 18 U.S.C. § 922(s) (Supp. V 1993)).

[4] Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended at 18 U.S.C. §§ 921–928 (1988 & Supp. I 1989, Supp. II 1990, Supp. III 1991, Supp. IV 1992, Supp. V 1993)).

[5] 505 U.S. 144 (1992).

[6] 18 U.S.C. § 922(s) (Supp. V 1993). "[The Act was created] to provide for a waiting period before the purchase of the handgun, and for the establishment of a national instant criminal background check system to be contacted by firearms dealers before the transfer of any firearm." *Id.*

> The purpose of [the Brady Act] is to prevent convicted felons and other persons who are barred by law from purchasing guns from licensed gun dealers, manufacturers or importers. . . . Local law enforcement officials are *required* to use the waiting period

thwart the escalating problems associated with handguns in America. As an amendment to the Gun Control Act of 1968,[7] the legislation imposed new and controversial procedures and requirements in the area of gun control. As the federal government's first attempt at controlling the firearms market, the Gun Control Act implemented a federal regulatory program which empowered the government to police the manufacture, distribution, and sale of firearms and handguns to the general public.[8] Most importantly, the Gun Control Act established a federal licensing procedure for firearms dealers.[9] Under the Act, in order to engage in the business of importing, manufacturing or dealing in firearms, or importing or manufacturing ammunition, an individual must file an application with the Secretary of the Treasury who will issue a license upon determination of eligibility.[10]

Perhaps the most important element of this portion of the legislation was the maintenance of records and files on the transfers and sales of firearms.[11] Under 18 U.S.C. § 923(g), the recipients of the federal firearms dealer license must maintain records, and the dealer must allow the Secretary of the Treasury to inspect the records upon proper authorization. However, prior to the enactment of the Brady Act, the control of weapon sales to felons, fugitives and other individuals lacking the requisite responsibility necessary for gun ownership rested entirely upon the knowledge and good faith of the federally licensed firearms dealer. The Gun Control Act made it unlawful for any individual to sell or transfer a firearm to any person they knew or had reasonable cause to believe did not meet the specified criteria Congress considered prerequisite to the ownership of a firearm.[12] Without the

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to determine whether a prospective handgun purchaser has a felony conviction or is otherwise prohibited by law from buying a gun.

H.R. REP. NO. 344, *supra* note 1, at 7, *reprinted in* 1993 U.S.C.C.A.N. at 1984 (emphasis added).

[7] 18 U.S.C. §§ 921–928 (1988 & Supp. I 1989, Supp. II 1990, Supp. III 1991, Supp. IV 1992, Supp. V 1993).

[8] *Id.*

[9] 18 U.S.C. § 923 (1988 & Supp. I 1989, Supp. II 1990, Supp. III 1991, Supp. IV 1992, Supp. V 1993).

[10] 18 U.S.C. § 923(a) (Supp. IV 1965–1968).

[11] This requirement of record keeping is evident in both 18 U.S.C. § 923(c) (Supp. IV 1965–1968) and 18 U.S.C. § 923(g) (Supp. IV 1965–1968).

[12] 18 U.S.C. § 922(d)(1)–(4) (Supp. IV 1965–1968). This section states:

> It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person—

requirement of a waiting period and background check, the Gun Control Act, instead, relied upon self-certification whereby a prospective gun purchaser would sign a sworn statement attesting to their capacity to purchase a firearm.[13] As a result, prior to the passage of the Brady Act, self-certification provided the only means of policing the firearms market in America. In response to increasing pressure from the public, Congress implemented the Brady Act in an effort to quell the fears of its electorate.

The Brady Act requires a waiting period of five business days for purchases of handguns from federally licensed gun dealers.[14] Intended solely as an interim provision until the federal government could implement an instant national background check system, the Act requires the local police officers to do the check for a limited time.[15] The background check provision augments the prior scheme by requiring the federally licensed firearms dealer to have the prospective gun purchaser complete a new information form.[16] The new form requires that the prospective recipient of the firearm provide a statement of biographical information and a sworn statement that he or she is not prohibited by law from receiving the weapon.[17] Upon receipt of the application from a prospective customer, the firearms dealer must, in certain cases,[18] transmit the

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(1) is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) is a fugitive from justice;

(3) is an unlawful user of or addicted to marihuana or any depressant or stimulant drug (as defined in section 201(v) of the Federal Food, Drug, and Cosmetic Act) or narcotic drug (as defined in section 4731(a) of the Internal Revenue Code of 1954); or

(4) has been adjudicated as a mental defective or has been committed to any mental institution.

Id.

[13] Federal firearms dealers were required to have potential gun purchasers complete ATF Form 4473, on which the customer would certify whether he or she was permitted to receive or possess a firearm. Commerce in Firearms and Ammunition, 33 Fed. Reg. 18555, 18569-70 (1968) (codified at 27 C.F.R. § 178.124 (1995)).

[14] 18 U.S.C. § 922(s)(1)(A)(ii)(I) (Supp. V 1993).

[15] 18 U.S.C. § 922(s) (Supp. V 1993). The Brady Act requires that the Attorney General establish a national instant background check system no later than 60 months after the enactment of the legislation. As a result, the burden of a 5 day waiting period and background check was intended to be only temporary. *Id.*

[16] Prospective purchasers are to fill out an ATF Form 5300.35 in order to facilitate the background checks. 27 C.F.R. § 178.102 (1995).

[17] 18 U.S.C. § 922(s)(3)(A)-(B)(i)-(iv) (Supp. V 1993).

[18] No background check or waiting period is required in certain circumstances. *See* 18 U.S.C. § 922(s)(1)(B)-(F) (Supp. V 1993). The waiting period may be avoided if the transferee demostrates in a written statement they need a hangun because of life threatening

information and send a copy of the form to the Chief Law Enforcement Officer (CLEO) assigned to the place of residence of the applicant within one day of its receipt.[19]

The Brady Act places the background check responsibilities onto CLEOs in every locality. Under the Brady Act, a CLEO is defined as "the chief of police, the sheriff or an equivalent officer or the designee of any such individual."[20] The rationale for requiring local law enforcement officials to conduct the background checks is best expressed by the Bureau of Alcohol, Tobacco, and Firearms in an Open Letter to State and Local Law Enforcement Officials:

> Each law enforcement agency serving as the CLEO will have to set it (sic) own standards based on its own circumstances, *i.e.*, the availability of resources, access to records, and taking into account the law enforcement priorities of the jurisdiction. The law is designed so that the law enforcement authority who is doing the check, is the one who is most likely to have to deal with the consequences of the buyer obtaining a handgun. Therefore, the CLEO of the buyer's residence has a vested interest in conducting an appropriate check and ultimately is in the best position to determine what is reasonable.
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> In rural, sparsely populated counties where many handgun purchasers are personally known to the CLEO, little or no research may be necessary in many cases.[21]

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circumstances, *id.* § 922(s)(1)(B); transferee presents a permit which entitles the transferee to possess the gun, *id.* § 922(s)(1)(C); if an authorized government official determines possession of the firearm by the transferee would not violate the law, *id.* § 922(s)(1)(D); the Secretary approves the transfer, *id.* § 922(s)(1)(E); and transmission of the transferee's statement is impracticable, *id.* § 922(s)(1)(F).

[19] 18 U.S.C. § 922(s)(1)(A)(i)(III)-(IV) (Supp. V 1993). Under the Brady Act, the firearms dealer is subject to other requirements as well. The dealer must verify the purchaser's identity, *id.* § 922(s)(1)(A)(i)(II); the dealer must inform the CLEO of the place of business of the dealer, the place of residence of the purchaser and any information the dealer receives after the purchaser has purchased the handgun that receipt or posssession of the handgun by the purchaser violates federal, state, or local law within one business day after receipt of such information, *id.* § 922(s)(4); the dealer is forbidden from disclosing the information to the public, *id.* § 922(s)(5); and the dealer must maintain copies of the statement and other requisite paperwork pertaining to the sale of the firearm, *id.* § 922(s)(6)(A).

[20] 18 U.S.C. § 922(s)(8) (Supp. V 1993).

[21] Open Letter from the ATF (Jan. 21, 1994), *quoted in* Koog v. United States, 852 F.

Relying upon the local law enforcement officials' knowledge of the community in which they reside and work, the Congress and the Bureau of Alcohol, Tobacco and Firearms hope to reduce the impact the background check will have on the law enforcement process. Additionally, by placing the responsibility onto the local official, the Brady Act creates a "vested interest" whereby the consequences of a dangerous individual obtaining a handgun provide the necessary impetus for local law enforcement involvement in the handgun purchase process.

The duties of the CLEO under the Brady Act involve an investigation into the background of the potential purchaser. After receiving the information from the firearms dealer, the CLEO

> to whom a transferor has provided notice . . . shall make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General.[22]

The Brady Act prohibits the firearms dealer from selling or transferring the weapon to the prospective purchaser until either the CLEO notifies the dealer that the CLEO does not have any information prohibiting the transfer or after five business days have elapsed from the date the dealer furnished the notice to the CLEO, whichever occurs first.[23] The CLEO's obligations under the Brady Act do not terminate simply with the completion of the background check. If the CLEO determines that the purchaser can lawfully obtain the weapon from the firearms dealer, the officer shall, within twenty business days after the date the prospective buyer made the statement, destroy the statement and any record generated from the information derived from the statement.[24] However, if the CLEO determines that the purchaser is ineligible to receive the firearm after the requisite investigation, the individual prohibited from receiving the firearm may request that the officer provide the reason for such a determination.[25] Additionally, in order to insure compliance with its newly enacted laws, Congress had the Brady Act amend the Gun Control Act's penalty provisions[26] to make violators of § 922(s) subject to penalties of no more than one thousand

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Supp. 1376, 1379 (W.D. Tex. 1994).

[22] 18 U.S.C. § 922(s)(2) (Supp. V 1993).

[23] 18 U.S.C. § 922(s)(1)(A)(ii)(I)-(II) (Supp. V 1993).

[24] 18 U.S.C. § 922(s)(6)(B)(i) (Supp. V 1993).

[25] 18 U.S.C. § 922(s)(6)(C) (Supp. V 1993). The CLEO must provide the reasons for such determination in writing within 20 business days after receipt of the request. *Id.*

[26] 18 U.S.C. § 924(a) (Supp. IV 1965-1968).

dollars, imprisonment for not more than one year, or both.[27]

B. *The Act as a Violation of the Tenth Amendment*

Recently, local law enforcement officials and the National Rifle Association have argued that the Brady Act is an improper infringement on state sovereignty in violation of the Tenth Amendment.[28] In six separate cases,[29] local sheriffs and law enforcement officials brought suit against the federal government arguing that the Brady Act violated the Tenth Amendment. Each plaintiff's basic argument rested upon the theory that the compulsory nature of the Brady Act violates the Tenth Amendment because it "commandeers"[30] state and local actors to administer a federally prescribed act.[31] Basic to the argument is the controversy surrounding the implementation of unfunded federal mandates onto state and local governments, for it is here where the major point of contention lies within the Tenth Amendment analysis.[32] In short, state and local officials quite often resent the federal government meddling into the affairs of the state and local governments, and the resentment

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[27] 18 U.S.C. § 924(a)(5) (Supp. V 1993) ("Whoever knowingly violates subsection (s) or (t) of section 922 shall be fined not more than $1000, imprisoned for not more than 1 year, or both.").

[28] U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

[29] Romero v. United States, 883 F. Supp. 1076 (W.D. La. 1995); Frank v. United States, 860 F. Supp. 1030 (D. Vt. 1994); Mack v. United States, 856 F. Supp. 1372 (D. Ariz. 1994); McGee v. United States, 863 F. Supp. 321 (S.D. Miss. 1994); Koog v. United States, 852 F. Supp. 1376 (W.D. Tex. 1994); Printz v. United States, 854 F. Supp. 1503 (D. Mont. 1994).

[30] New York v. United States, 505 U.S. 144, 161 (1992).

[31] David Broder, *To Some, The Brady Bill Is Just Another Unfunded Mandate*, CHIC. TRIB., June 1, 1994, at 21.

[32] While a full discussion of the impact of federal mandates is beyond the scope of this Note, there are some very interesting writings on the subject available. *See generally* Paul Gillmor & Fred Eames, *Reconstruction of Federalism: A Constitutional Amendment to Prohibit Unfunded Mandates*, 31 HARV. J. ON LEGIS. 395 (1994) (decrying the use of unfunded mandates as being repugnant to federalism and advocating the passge of a constitutional amendment to reign in Congress' tendency to employ unfunded mandates); Edward A. Zelinsky, *Unfunded Mandates, Hidden Taxation, and the Tenth Amendment: On Public Choice, Public Interest, and Public Services*, 46 VAND. L. REV. 1355 (1993) (employing a public choice model to conclude that unfunded mandates are the result of politicians who take advantage of the structure of government to provide largesse to minority constituencies).

is most powerful when the federal government directs how the state and local officials should allocate their tax revenue.[33]

III. THE TENTH AMENDMENT

A. *The Evolution of the Tenth Amendment*

When the founding fathers drafted the Tenth Amendment, fears of an overpowering central government were fresh in their minds, for they had just escaped from an oppressive, authoritarian government through a fierce and violent struggle.[34] Instead of placing unlimited powers into the hands of the federal government, they specifically enumerated in the Constitution, "[t]he powers not delegated to the United States by the Constitution, nor prohibited

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[33] Unfunded federal mandates have been thrust into the public's eye as a result of the November 1994 election. With ever-increasing budget demands on both state and local governments, these mandates have caused some to argue that the policy behind such mandates needs to be seriously examined. *See* Mickey Edwards, *Getting the Big Boys Off Our Backs*, L.A. TIMES, Dec. 20, 1994, at B15; George F. Will, *Tenth Amendment Time*, NEWSWEEK, Jan. 9, 1995, at 68. Although a discussion of these mandates moves way beyond the intentions of this Note, Congress has recently passed legislation addressing the unfunded mandate situation. The House of Representatives passed the Unfunded Mandate Reform Act of 1995 on February 1, 1995. 141 CONG. REC. H1011-1012 (daily ed. Feb. 1, 1995). The Act passed in the Senate on January 27, 1995. 141 CONG. REC. S1683 (daily ed. Jan. 27, 1995). The House has also considered other pieces of legislation addressing the problem of unfunded mandates: The Unfunded Federal Mandates Relief Act of 1995, 141 CONG. REC. H171 (daily ed. Jan. 9, 1995), and a proposal to amend the Constitution of the United States barring federal unfunded mandates to the states, 141 CONG. REC. H175 (daily ed. Jan. 9, 1995).

[34] *See generally* ALFRED H. KELLY & WINFRED A. HARBISON, THE AMERICAN CONSTITUTION, ITS ORIGINS AND DEVELOPMENT 50–54 (4th ed. 1970) (providing examples of the British government's overpowering administration of the colonies). Although the founding fathers created a decentralized state-oriented system to avoid the accompanying problems of a strong central government, the breadth of federal powers was subject to debate and controversy during the formation of the Constitution. *See generally* MORTEN BORDEN, THE ANTIFEDERALIST PAPERS (1965) (providing excerpts from papers, letters, etc., of those who opposed ratification of the Constitution); THE FEDERALIST NO. 11 (Alexander Hamilton) (arguing that a stronger and more united central government is in the best interests both politically and economically of each of the individual states); THE FEDERALIST NO. 45 (James Madison) (surmising that since the States are essential to the functioning of the federal government and the federal government is not essential to the continuation of the states, states will be in an advantageous position under the Constitution); CECELIA M. KENYON, THE ANTIFEDERALISTS (1966) (noting that the Antifederalists were composed largely of "men of little faith" in centralized government).

by it to the States, are reserved to the States, respectively, or to the people."[35] While the intentions of the founding fathers may seem apparent, the Tenth Amendment, through interpretation, oversight, or simple ignorance, appears to have become the forgotten amendment of the Bill of Rights.[36]

Over the years, the Supreme Court has traveled an unusual path in its interpretation of the Tenth Amendment. In the beginning, the Court held that the federal government's power under the Commerce Clause[37] should be given great deference, thus allowing the federal government to trump certain state rights and functions.[38] As time passed, however, the court retracted some degree of the power that they had read into the Commerce Clause and limited congressional intrusions into the realm of power reserved to the states.[39]

However, toward the end of the New Deal era, the Court once again changed direction and held that the federal government deserved deference.[40] Through the Court's renewal of the broader, more generous interpretation, the breadth of federal power continued to expand over the next few decades with the Tenth Amendment no longer viewed as an obstruction to the powers of the federal government. Thus, subsequent to the New Deal era, Congress enjoyed

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[35] U.S. CONST. amend. X.

[36] *See, e.g.*, Edwards, *supra* note 33; William Murchison, *The Forgotten Amendment*, TEX. LAW., Aug. 15, 1994, at 22; Llewellyn H. Rockwell, Jr., *Pleading the 10th . . . and Winning!*, WASH. TIMES, June 12, 1994, at B3.

[37] U.S. CONST. art. I, § 8, cl. 3.

[38] Gibbons v. Ogden, 22 U.S. 1, 189-97 (1824).

[39] As the Court began to establish a line to distinguish the powers of the Congress and the powers that were reserved to the state governments, it set forth a concept of "dual federalism." *See generally* Edward Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950) (noting that with the passing of federalism what was a Constitution of Rights has instead become a Constitution of Powers). The Court intepreted the Tenth Amendment to define and limit the powers of the Congress and determine which activities and regulations were reserved to the states. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 4.5, at 143 (1991). Prior to the New Deal era, the Court repeatedly struck down federal legislation that imposed on state power and sovereignty. *See, e.g.*, Railroad Retirement Bd. v. Alton R. R., 295 U.S. 330 (1935); Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922); Hammer v. Dagenhart, 247 U.S. 251 (1918); Southern Pac. Co. v. Jensen, 244 U.S. 205 (1917); Adair v. United States, 208 U.S. 161 (1908); United States v. E.C. Knight Co., 156 U.S. 1 (1895). The New Deal and the Great Depression saw the Court maintain its strict control over the scope of federal legislation through a broad Tenth Amendment interpretation protecting state sovereignty. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936), *overruled by* United States v. Darby, 312 U.S. 100, 123 (1941); United States v. Butler, 297 U.S. 1 (1936); A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935).

[40] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30-31 (1937).

broad discretion in regulating the states under the Commerce Clause.[41]

Nonetheless, in 1976, the Supreme Court rehabilitated the Tenth Amendment and the powers reserved to the states. In *National League of Cities v. Usery*,[42] the Court ruled that the Fair Labor Standards Act could not be applied to regulate the minimum wage and overtime compensation of state and municipal employees.[43] The Court held that the Tenth Amendment expressly declares that the Congress may not exercise its power in a manner that infringes on the powers solely reserved to the states.[44] However, the Court did explicitly note that the Tenth Amendment would not limit federal regulation of the activities of nongovernmental employees and entities, as the Court had no intentions of disturbing the modern tests for determining the breadth of the federal commerce power.[45] The Court was concerned with congressional intrusion into the traditional functions of the states, and it found that determining the level of compensation to state employees was an essential attribute belonging to the state.[46]

During the period from 1976 until 1985, the Court did not strike down any federal actions under the *National League of Cities* interpretation; however, the lower courts had tremendous difficulty with the chore of identifying the powers and activities solely reserved to the states. As a result, the lower courts produced an abundance of inconsistent decisions regarding the Tenth Amendment.[47] After the *National League of Cities* decision, the Court attempted to structure formal tests to enable a precise determination of the applicability of the Tenth Amendment in regards to federal law interfering with state and local autonomy.[48] Although the Court had made numerous efforts to

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[41] For an excellent discussion of the post-New Deal decisions see 1 RONALD D. ROTUNDA ET AL., TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE §§ 4.8-4.9 (1986).

[42] 426 U.S. 833 (1976), *overruling* Marland v. Writz, 392 U.S. 183 (1968), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

[43] *National League of Cities*, 426 U.S. at 851–52.

[44] *Id.* at 845. The majority stated: "Congress may not . . . force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made." *Id.* at 855.

[45] *Id.* at 841.

[46] *Id.* at 845.

[47] NOWAK & ROTUNDA, *supra* note 39, § 4.10, at 171.

[48] *See* EEOC v. Wyoming, 460 U.S. 226, 239–40 (1983) (permitting the state to set its own goals as long as it applied the federal regulations in the process); Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 753–58 (1982) (ignoring the test and instead relying upon the extensive powers of the Commerce Clause); United Transp. Union v. Long Island R.R., 455 U.S. 678, 683–86 (1982) (holding that the state-owned railroad was not performing a "traditional governmental function," and therefore, the state was not

fashion a Tenth Amendment analysis under the *National League of Cities* decision, the Court's attempts proved unsuccessful.[49]

As a result, the Court revisited the issue of the Tenth Amendment in *Garcia v. San Antonio Metropolitan Transportation Association.*[50] The *Garcia* Court reverted back to the expansive interpretation of the federal powers that had existed for over forty years before the decision in *National League of Cities.*[51] In overruling *National League of Cities,*[52] the Court said that the political process was the proper restraint on the powers of the federal government;[53] therefore, the judiciary should refrain from interfering with federal and state policies.[54] The Court abandoned the confusing traditional government function tests of *National League of Cities*[55] and rejected judicially enforced federalism that preserved a state's "traditional governmental functions" from federal regulatory interference.[56]

The Court's reliance upon the political process shifted the Court's analysis of the Tenth Amendment from a judicial doctrine into a political doctrine,[57]

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entitled to immunity); Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 287–88 (1981) (articulating the three-prong *National League of Cities* test).

[49] Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 530–31 (1985).

[50] *Id.* at 530; *see* Martha A. Field, Comment, Garcia v. San Antonio Metropolitan Transit Authority*: The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84, 85 (1985).

[51] In reverting back to its earlier position, the *Garcia* Court reaffirmed the deference that had been given to the Congress during the period between the decisions in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), and National League of Cities v. Usery, 426 U.S. 833 (1976).

[52] 426 U.S. 833 (1976).

[53] *Garcia,* 469 U.S. at 546–47.

[54] One commentator has argued that the judicial involvement that arose from the *National League of Cities* decision was quite similar to the *Lochner* period of judicial activism in which the Court conducted its affairs in the nature of a superlegislature. Field, *supra* note 50, at 89–95.

[55] 426 U.S. at 852.

[56] Note, *Clear Statement Rules, Federalism, and Congressional Regulation of States,* 107 HARV. L. REV. 1959, 1961 (1994).

[57] Robert H. Freilich & David G. Richardson, *Returning to a General Theory of Federalism: Framing a New Tenth Amendment United States Supreme Court Case,* 26 URB. LAW. 215, 219 (1994). Originally Professor Wechsler argued that the states' role in the operation of the federal government through the election of Senators, Representatives in the House and the President, would exert pressure and influence into the political process that would ensure that the states' needs and powers are protected. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government,* 54 COLUM. L. REV. 543, 546 (1954). Some commentators question the ability of the political process to protect state rights. Some argue that this theory runs into problems because in recent years the important vehicles of state influence

leaving the states with the procedural safeguards of the federal system as their primary defense[58] against federal interference in the internal affairs of the states.[59] The Court continued its march away from federalism when it reaffirmed the *Garcia* holding three years later in *South Carolina v. Baker*.[60]

Although the Court had made significant strides away from its federalism jurisprudence, the federalism debate was once again revived in *Gregory v. Ashcroft*.[61] While focusing on the validity of the Age Discrimination in Employment Act of 1967[62] as applied to state judges, the Court stated that the principles of federalism and dual sovereignty rejected the presumption of the Act's validity in regard to state officials without clear and unambiguous language to the contrary.[63] Although the case set forth the ground work for the resurgence of federalism, the Court made no significant changes to the doctrine established in *Garcia*.[64] Yet, *Gregory* set the stage for the Court's revision of the Tenth Amendment standards in *New York v. United States*,[65] which the Court tackled in the following term.

(namely Senators, political parties and the news media) have become much more connected with the nation as a whole than as direct representatives of the states. However, others contend that the *Garcia* decision reaffirms the strength of the political process because, without interference of the judicial branch, individuals can voice their opinions into the public forum and Congress can respond to the views of its citizenry. Note, *At Last, Federal Wage and Overtime Protection for State and Municipal Empoyees* [sic]*: The F.L.S.A. After* Garcia v. San Antonio Metropolitan Transit Authority, 23 CAL. W. L. REV. 105, 115–18 (1986).

[58] The *Garcia* Court postulated that federal interference with state activities may be invalid if the state alleges and proves some "extraordinary defects in the national political process." South Carolina v. Baker, 485 U.S. 505, 512 (1988) (citing Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 556 (1985)).

[59] Note, *Federalism, Political Accountability, and the Spending Clause*, 107 HARV. L. REV. 1419, 1425 (1994).

[60] 485 U.S. 505, 512 (1988). In the previous term, the Court continued to shift away from federalism when it decided that the Congress could withhold the payment of highway funds if a state refused to comply with its mandatory drinking age requirements. South Dakota v. Dole, 483 U.S. 203, 210–12 (1987).

[61] 501 U.S. 452 (1991).

[62] Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-634 (1988 & Supp. I 1989, Supp. II 1990, Supp. III 1991, Supp. IV 1992)).

[63] Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 904 (1994).

[64] Jesse H. Choper, *Federalism and Judicial Review: An Update*, 21 HASTINGS CONST. L.Q. 577, 582–83 (1994).

[65] 505 U.S. 144 (1992).

B. New York v. United States

In *New York*,[66] the Court addressed the constitutionality of the Low-Level Radioactive Waste Policy Amendments Act of 1985,[67] under which states were obligated to dispose of the wastes generated within their borders.[68] In order to assure compliance with its directives, the Congress established three types of incentives for states: monetary incentives,[69] access incentives,[70] and take title incentives.[71] The Supreme Court held that the monetary incentives and access incentives were well within the powers of Congress under the Spending and Commerce Clauses of the Constitution.[72]

However, Justice O'Connor, writing for the majority, found the take title provision of the Act to be objectionable because it commanded the states to comply with the federally prescribed waste disposal methods or take title to the waste.[73] The Court reasoned that if the federal government could compel the

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[66] For some helpful analyses of the present state of federalism and the *New York* decision, see generally Freilich & Richardson, *supra* note 57 (providing advice on how state governments can restore federalism by using the judicial inroads created in the *New York* decision); David M. O'Brien, *The Supreme Court and Intergovernmental Relations: What Happened to "Our Federalism"?*, 9 J.L. & POL'Y 609 (1993) (noting that the Rehnquist Court in its attempt to restore "dual Federalism" has yet to resolve the inherent line-drawing problems associated with dual federalism); Rubin & Feeley, *supra* note 63 (arguing that federalism arose in the U.S. more as a convenient remanent of British colonial administration than as an adoption by the founding fathers of a political theory).

[67] Pub. L. No. 99-240, 99 Stat. 1842 (codified in 42 U.S.C. §§ 2021b–2021j (1988)).

[68] 42 U.S.C. § 2021c(a)(1)(A) (1988).

[69] 42 U.S.C. § 2021e(d)(1) allows the states with the waste disposal sites to collect a surcharge on waste imported from other states. Under 42 U.S.C. § 2020e(d)(2)(A), the Secretary of Energy makes payments from these funds to each state that has complied with the Act.

[70] Congress established penalties in the form of additional surcharges to states that did not comply within the proper deadlines stated by the Act. 42 U.S.C. § 2021e(e)(2)(A) (1988).

[71] The take title provision was the most severe in that it forced the state, upon request of the generator, to accept full ownership and responsibility of the waste if the state did not provide disposal facilities. 42 U.S.C. § 2021e(d)(2)(C) (1988).

[72] New York v. United States, 505 U.S. 144, 173-74 (1992). Since each set of incentives was supported by affirmative constitutional grants of power to the Congress, neither of the incentives intruded onto state sovereignty protected by the Tenth Amendment. *Id.*

[73] *Id.* at 175-76. "As an initial matter, Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" *Id.* at 161 (citing Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 288 (1981)).

state and local governments to do its dirty work and choose the methods and locations for waste disposal, the accountability of the federal officials will be diminished.[74] Instead, the state officials will bear the brunt of the public disapproval, even though they lack the ability to avoid implementation of the program.[75] Recognizing the inequity of the arrangement, the Court stated that "[w]here a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents."[76] The essential thrust of the Tenth Amendment is to preserve the sovereignty of the states and prevent an overbearing federal government from dictating local policies and plans from afar.[77]

As a result of the overreaching intrusions of the Congress into the area of state sovereignty, the Court permitted New York State to dictate its own policies concerning the disposal of radioactive waste.[78] According to the *New York* Court, Congress may encourage state regulation rather than compel it through the offering of incentives, or Congress may simply preempt the state government and regulate the area itself.[79]

Once again, the Court has entered into the realm of federalism, and the future of this area of constitutional jurisprudence is unclear.[80] With its recent foray into this field, the Court has again diffused the guiding light of its Tenth Amendment jurisprudence. As a result, the lower courts have had to sift through the recent decisions and attempt to fashion logical and well-reasoned

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[74] *New York*, 505 U.S. at 168-69.

[75] *Id.*

[76] *Id.* at 178.

[77] Justice O'Connor concluded the opinion by stating:

> States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. The Constitution instead "leaves to the several States a residuary and inviolable sovereignty," reserved explicitly to the States by the Tenth Amendment.
>
> Whatever the outer limits of that sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program.

Id. at 188 (citing THE FEDERALIST No. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961)).

[78] *Id.*

[79] *Id.* at 166-69.

[80] William A. Hazeltine, New York v. United States: *A New Restriction on Congressional Power vis-á-vis the States?*, 55 OHIO ST. L.J. 237, 253 (1994).

opinions regarding the Tenth Amendment's application without clear direction from the Supreme Court.[81]

IV. TAKING AIM AT THE BRADY ACT

Recently, six separate actions[82] were filed challenging the constitutionality of the Brady Act.[83] The facts of each controversy are quite similar. In these cases, six rural sheriffs sought to overturn or enjoin the Brady Acts provisions which impose onto CLEOs requirements of a background check on any handgun purchased by residents of their jurisdiction. Each case more or less

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[81] The district court in *Koog v. United States* accurately expressed the problems with the Tenth Amendment jurisprudence of the Supreme Court stating that: "Supreme Court decisions about the Tenth Amendment do not reflect a pattern of straight line development of a theme. . . . [T]his Court has no better guide than simply to align the principles enunciated in these cases on a continuum and decide where the instant case falls." 852 F. Supp. 1376, 1381 (W.D. Tex. 1994). The court concluded "[o]pinions such as *New York*, *Garcia*, and *FERC* all exist side by side as precedents binding on [the] Court." *Id.* at 1387. Since *New York*, a few circuits and districts have applied the reasoning of the Supreme Court. *See* Board of Natural Resources v. Brown, 992 F.2d 937, 947 (9th Cir. 1993) (stating that the "'Federal Government may not compel the States to enact or administer a federal regulatory program.'") (quoting *New York*, 505 U.S. at 188); Zych v. Unidentified, Wrecked & Abandoned Vessel, 811 F. Supp. 1300, 1318 (N.D. Ill. 1992) (carefully noting that the federal government can encourage cooperation not compel it), *aff'd*, 19 F.3d 1136 (7th Cir.), *cert. denied*, 115 S. Ct. 420 (1994); Ponca Tribe of Okla. v. State, 834 F. Supp. 1341, 1347 (W.D. Okla. 1992) (holding, in part, that the Federal Indian Gaming Regulatory Act was unconstitutional under the Tenth Amendment because it "compelled" states to act), *aff'd in part and rev'd in part*, 37 F.3d 1422 (10th Cir.), *petition for cert. filed*, 63 U.S.L.W. 3477 (Dec. 9, 1994) (No. 94-1030). *But see* Cheyenne River Sioux Tribe v. South Dakota, 3 F.3d 273, 281 (8th Cir. 1993) (rejecting a Tenth Amendment challenge to the Indian Gaming Regulatory Act).

Recently, the Supreme Court affirmed the Fifth Circuit's decision in United States v. Lopez, 2 F.3d 1342 (5th Cir. 1993), *aff'd*, 115 S. Ct. 1624 (1995) (holding the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q) (Supp. V 1993), was unconstitutional).

[82] *See supra* notes 29–32 and accompanying text.

[83] The NRA has shifted from its constitutional stronghold, the Second Amendment, to a new tactic, the Tenth Amendment. *See* Tom Teepen, *NRA Shooting Nothing but Blanks with Second Amendment Argument*, DAYTON DAILY NEWS, Apr. 12, 1994, at 7A; Pierre Thomas, *The Brady Law: Sheriffs Challenging Federal Authority*, WASH. POST, Sept. 19, 1994, at A1. A seventh case is currently pending in the United States District Court for Wyoming and the presiding judge has announced he will render a decision by the end of the year. *Ruling on Gun Background Checks Vowed*, ROCKY MOUNTAIN NEWS, Aug. 28, 1995, at 18A.

addresses the same basic issues: (1) Did the sheriff have standing to sue?;[84] (2) How do the provisions of the Brady Act apply to Chief Law Enforcement Officers?; (3) Were the provisions of the background check violative of the Tenth Amendment?; and (4) If so, was the section severable from the rest of the Brady Act? Five of the six district courts hearing the challenges determined that the Brady Act was unconstitutional[85] while one found the rule passed constitutional scrutiny.[86] Due to the intense emotions and strong convictions that seem to embroil the gun control debate, the stage seems to be set for an intense battle among the circuit courts[87] with a possible trip to the Supreme

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[84] Although a complete discussion of standing is beyond the scope of this Note, the Supreme Court further clarified the concept of standing by requiring that the plaintiff demonstrate to the court that he or she has suffered, or is in imminent danger of suffering, a distinct and palpable personal injury fairly traceable to the defendant's allegedly unlawful conduct and the injury can most likely be redressed through the judicial system. *See* Allen v. Wright, 468 U.S. 737, 751 (1984); *see also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

In the recent challenges to the Brady Act, the interpretation of the first element of standing, injury in fact, varies under each of the six cases to a certain extent; however, in each case, the district court did find the requisite injury in fact. Romero v. United States, 883 F. Supp. 1076, 1081 (W.D. La. 1995); Frank v. United States, 860 F. Supp. 1030, 1035-36 (D. Vt. 1994); Mack v. United States, 856 F. Supp. 1372, 1377 (D. Ariz. 1994); McGee v. United States, 863 F. Supp. 321, 325 (S.D. Miss. 1994); Koog v. United States, 852 F. Supp. 1376, 1381 (W.D. Tex. 1994); Printz v. United States, 854 F. Supp. 1503, 1507 (D. Mont. 1994).

The second element of standing, causation, also received varying interpretations; however, each district court also found the necessary link between the Brady Act and the injury. *Romero*, 883 F. Supp. at 1081; *Frank*, 860 F. Supp. at 1039; *Mack*, 856 F. Supp. at 1377; *McGee*, 863 F. Supp. at 325; *Koog*, 852 F. Supp. at 1380; *Printz*, 854 F. Supp. at 1507. As for the third element, redressability, each court found sufficient redressability available in the judicial system. *Romero*, 883 F. Supp. at 1081; *Frank*, 860 F. Supp. at 1040; *Mack*, 856 F. Supp. at 1377; *McGee*, 863 F. Supp. at 321 (making no specific reference to redressability); *Koog*, 852 F. Supp. at 1380; *Printz*, 854 F. Supp. at 1507.

In addition to the standing requirements, the party must have the capacity to sue. The ability of the parties to bring a Tenth Amendment challenge is derived from Federal Rule of Civil Procedure 17 which requires that the sheriffs must be a real party in interest and have the capacity to sue or be sued. Once again, each district court found the requisite capacity to carry forth the suit. *Romero*, 883 F. Supp. at 1078; *Frank*, 860 F. Supp. at 1034-35; *Mack*, 856 F. Supp. at 1378; *McGee*, 863 F. Supp. at 325; *Koog*, 852 F. Supp. at 1380-81; *Printz*, 854 F. Supp. at 1508-09.

[85] *See Romero*, 883 F. Supp. at 1089; *Frank*, 860 F. Supp. at 1044; *Mack*, 856 F. Supp. at 1383-84; *McGee*, 863 F. Supp. at 327-28; *Printz*, 854 F. Supp. 1519-20.

[86] *Koog*, 852 F. Supp. at 1389.

[87] As of the publication of this Note, the battle in the circuits has begun. Each of

the district court opinions have been appealed to their respective circuit courts. Mack v. United States, 1995 WL 527616 (9th Cir. Sept. 8, 1995); Jan Crawford Greenburg, *Brady Law is Upheld in 1st Appeal, Gun-Control Measure Ruled Constitutional*, CHI. TRIB., Sept. 9, 1995, at 6 (stating that the Fifth and Second Circuits have appeals pending before them).

In the Fifth Circuit, the government filed appeals in *McGee*, *Koog*, and *Romero*. *Appeals Court Hears Brady Law Advocates' Arguments*, DALLAS MORNING NEWS, June 8, 1995, at 28A (acknowledging that *Koog* and *McGee* decisions were consolidated and the *Romero* case was appealed seperately). *McGee* and *Koog* were consolidated on appeal, and the court heard arguments on June 7, 1995 and announced it would render a decision before the end of the year. *Id.* Arguments have not been heard in the *Romero* case as of the publication of this Note. The federal government has also filed an appeal in the Second Circuit challenging the district court's holding in *Frank*. Greenburg, *supra*, at 6.

In the Ninth Circuit, arguments were heard for the appeal of *Mack* and *Printz* on July 11, 1995. The court returned a decision on September 8, 1995 holding that the Brady Act does not violate the Tenth Amendment. The court held that "[t]he obligation imposed on state officers by the Brady Act is no more remarkable than . . . the federally imposed duty to report missing children . . . or traffic fatalities . . . ." Mack v. United States, 1995 WL 527616 (9th Cir. Sept. 8, 1995). Furthermore, the court refused to read *New York v. United States* broadly and distinguished the focus of *New York* as stating "the federal government is not entitled to coerce the states into legislating or regulating according to the dictates of the federal government." *Id.* at *2. The court held that "[t]he Brady Act is not the kind of federal mandate condemned by *New York*. *Id.* at *5. Instead, the Brady Act was characterized as a regulatory program aimed at individuals, not states, and while the CLEOs must make reasonable efforts to carry out the federal program, they are not being conscripted into a central sovereign process. *Id.* The court was unpersuaded by the argument that the Brady Act interferes with the state duties of the sheriffs, and rather, the court held "*Mack* and *Printz* have not demonstrated that the Act will interfere unduly with their duties." *Id.* Thus, the computer checks, required paperwork and other requirements of the Brady Act did not create enough of a burden for the Ninth Circuit to find the kind of interference with state functions that would raise Tenth Amendment concerns. *Id.* Therefore, the Ninth Circuit held the Brady Act to be constitutional.

However, the Ninth Circuit's decision was not unanimous. The dissent characterized the Brady Act as "a step toward concentrating power in the hands of the federal government, for it treats state officials and workers as if they were mere federal employees. It makes every CLEO's office an office of the federal bureacracy funded by the states, but directed from Washington." *Id.* at *9 (Fernandez, J. dissenting). Thus, the validity of the Brady Act continues to be suspect under the Tenth Amendment. Although the majority held the Brady Act constitutional, the court's charaterization of the Brady Act's interference with the sheriffs' state duties misconstrues the potential impact of the federal legislation. As this Note will explain,

Court in the future.[88]

Although the Supreme Court's Tenth Amendment jurisprudence remains unclear, the provisions of the Brady Act do appear suspect under the Court's views expressed in *New York v. United States*.[89] While it is clear that handgun sales affect interstate commerce and thus are subject to congressional regulation,[90] the permissible reach of the regulation over firearms is subject to certain restraints and limitations. As a result, the crucial question in the congressional regulation of handgun purchases is whether the Tenth Amendment limits the methods which Congress may use to regulate these purchases.[91]

A. *How the Brady Act Affects CLEOs*

Under § 922(s)(2) of the Brady Act, the CLEO *shall* make a *reasonable* effort to determine whether the handgun purchase would violate the law.[92] In the recent challenges to the Brady Act, the federal government consistently argued that the provision was entirely discretionary, and that the CLEO was

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the Brady Act imposes obligations which do interfere with the state functions of sheriffs, and as a result, the Brady Act raises serious Tenth Amendment concerns.

[88] Julian Eule, professor and associate Dean at the UCLA Law School, believes that the United States Supreme Court's decision in

> Lopez [v. United States, 115 S. Ct. 1624 (1995)] provides strong evidence that there is a majority on the Court that is going to take very seriously the demarcation between federal and state power. . . . The Brady Act and the assault weapons ban are likely to provide opportunities to see more clearly where the Court wants that line to be drawn.

Michael Rezendes, *Reading Their "Rights" Gun Lobby Challenging 2d Amendment's Interpretation*, BOSTON GLOBE, Sept. 10, 1995, at A1.

[89] 505 U.S. 144 (1992).

[90] *See* Huddelston v. United States, 415 U.S. 814, 825 (1974) (holding that exchanges of firearms with pawnshops are covered under the Federal Gun Control Act of 1968); United States v. Edwards, 13 F.3d 291, 293 (9th Cir. 1993) (holding that Congress has the power to enact the Gun Free School Zones Act), *vacated*, 115 S. Ct. 1819 (1995); United States v. Evans, 928 F.2d 858, 862 (9th Cir. 1991) (holding that it was reasonable for Congress to conclude that possession of firearms affects the national economy and is within the regulatory scope of Congress).

[91] *See Printz*, 854 F. Supp. at 1506.

[92] 18 U.S.C. § 922(s)(2) (Supp. V 1993) (emphasis added). *See supra* text accompanying note 22.

not obligated to conduct the background checks.[93] Obviously, the federal government was attempting to avoid the serious problems that could arise under the Tenth Amendment due to the direct command of the Brady Act's language.[94] Although the government presented a plausible argument in favor of reading the legislation as discretionary, its interpretation fails in light of the legislative intent as revealed in the committee reports.[95] Ideally, "as long as the statutory scheme is coherent and consistent, there is generally no need for the court to inquire beyond the plain meaning of the statute."[96] Unfortunately, while the language of the Brady Act does permit some understanding of congressional intentions, it falls far short of evincing a plain meaning. As a result, the meaning of the statute must be evaluated through the process of statutory interpretation.[97]

1. *The Mandatory Language of the Brady Act*

When Congress drafted the Brady Act, it specifically used the word "shall," as opposed to "may," in its efforts to direct the CLEOs to conduct the background checks.[98] Congress' use of the word "shall" confirms the interpretation that the CLEO is expected to complete background checks, and it clearly does not indicate that CLEOs have been granted any discretionary

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[93] *See* Romero v. United States, 883 F. Supp. 1076, 1084 (W.D. La. 1995); Frank v. States, 860 F. Supp. 1030, 1039 (D. Vt. 1994); Mack v. United States, 856 F. Supp. 1372, 1380 (D. Ariz. 1994); McGee v. United States, 863 F. Supp. 321, 326 (S.D. Miss. 1994); Koog v. United States, 852 F. Supp. 1376, 1379 (W.D. Tex. 1994); *Printz*, 854 F. Supp. at 1511.

[94] The government appears to have relied upon the Bureau of Alcohol, Tobacco and Firearm's Open Letter to State and Local Law Enforcement Officials to support its belief that the Brady Act may require no effort at all in the background checks. *See supra* text accompanying note 21.

[95] *See Printz*, 854 F. Supp. at 1511 (citing DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988)). "Although [a] court must generally construe the [Brady] Act to avoid serious constitutional problems, it may not do so where such a construction is plainly contrary to the intent of Congress." *Printz*, 854 F. Supp. at 511.

[96] United States v. Ron Pair Enters., Inc., 489 U.S. 235, 240–41 (1989).

[97] *See* 2A NORMAN J. SINGER, SUTHERLAND ON STATUTORY CONSTRUCTION § 45.02 (5th ed. 1992). A majority of courts rely upon the legislative intentions as expressed through committee reports and other congressional records in order to interpret statutes, for these documents tend to be highly persuasive and enlightening in the policy and legislative scheme behind a statute. *Id.* at § 45.05–.06.

[98] *See supra* text accompanying note 22.

power in their efforts to comply.[99]

More importantly, the House Judiciary Committee Report repeatedly makes references to the mandatory nature of the background checks implemented by the Brady Act.[100] In three separate sections of the report, the committee explicitly referred to the "required" nature of the background checks.[101] The Judiciary Committee expressed that the provisions of the background check are an affirmative duty expected of the CLEOs, and the committee gave no indication that the Act was of a discretionary nature; instead, through the use of the mandatory language, it reinforced the interpretation that the Brady Act expects some degree of required effort on the part of local officials. Unmistakably, Congress intended the CLEO to comply with the requirements of the Brady Act. The legislation was enacted to act as a national solution to the escalating gun violence occurring in the United States,[102] and without total compliance,[103] the remedial effects of the legislation would fail.

Additionally, the House of Representatives' rejection of an amendment

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[99] The definition of "shall" is "to indicate . . . command." WEBSTER'S DICTIONARY 635 (1992).

[100] H.R. REP. NO. 344, *supra* note 1, *reprinted in* 1993 U.S.C.C.A.N. at 1984.

[101] In the "Summary and Purpose" section of the committee report, the Judiciary Committee stated that "[l]ocal law enforcement officials are *required* to use the waiting period to determine whether a prospective handgun purchaser has a felony conviction or is otherwise prohibited by law from buying a gun." H.R. REP. NO. 344, *supra* note 1, at 7, *reprinted in* 1993 U.S.C.C.A.N. at 1984 (emphasis added). Additionally, under the section entitled "Brief Explanation of H.R. 1025" (Brady Act prior to its passage), the Judiciary Committee reinforced the mandatory nature of the Brady Act.

> The bill *requires* local law enforcement officials to make a *reasonable effort* to ascertain whether the prospective purchaser is forbidden from buying the handgun. This background check *must* be conducted within five business days from the date on which the prospective purchaser first indicated his or her intention to purchase the handgun.

H.R. REP. NO. 344, *supra* note 1, at 10, *reprinted in* 1993 U.S.C.C.A.N. at 1987 (emphasis added). Finally, the Judiciary Committee, in the section entitled "Section-by-Section Analysis," further explained that "[t]he new subsection would *require* a chief law enforcement officer who receives notice pursuant to this bill of a proposed handgun transfer to make a reasonable effort to ascertain within five business days, using available criminal history records, whether there is any legal impediment to the transfer." H.R. REP. NO. 344, *supra* note 1, at 17, *reprinted in* 1993 U.S.C.C.A.N. at 1994 (emphasis added).

[102] *See supra* text accompanying note 1.

[103] In certain circumstances, the waiting period and background check have been excused. *See supra* note 18. Although Congress recognized particular circumstances in which a background check would not be necessary, it limited the possible exemptions.

replacing "shall" with "may"[104] corroborates this apparent intention and weighs heavily against any flexible interpretation granting CLEOs discretion in implementing the Brady Act's provisions. During the final days of the formation of the Brady Act, Congressman Steve Schiff specifically proposed an amendment to change the language under § 922(s)(2) of the Brady Act.[105] Congressman Schiff "proposed to make the performance of the background check an option, rather than a requirement, for state and local law enforcement agencies. . . . [The] amendment would [have struck] the ['shall'] and insert[ed] 'may,' thus making it an option for state and local agencies . . . ."[106] By rejecting the amendment, the House of Representatives reinforced its commitment to the mandatory nature of the act.

Another important aspect of the background check provision lies within its language: "[I]ncluding research in whatever State and local recordkeeping systems are available and a national system designated by the Attorney General."[107] The language implies that the reasonable effort of the background check will require a *minimum* amount of research into *whatever* recordkeeping system is available to the CLEO. Through its use of the word "including," Congress has placed a minimum threshold below which the CLEO cannot go without violating the purpose of the Brady Act. This CLEO must undertake some reasonable efforts of research, thereby requiring the expenditure of the CLEO's limited time and precious resources.

The Brady Act imposes two additional duties onto the CLEOs when conducting the mandatory background checks.[108] Two separate provisions command the CLEO to act. First, the CLEO must destroy the paperwork generated during the background search if the applicant is deemed eligible,[109] and second, if the applicant is determined to be ineligible to receive a handgun, the CLEO must provide the reason for the denial upon proper request.[110]

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104 139 CONG. REC. H9143-44 (daily ed. Nov. 10, 1993). The House rejected the Schiff motion to recommit the bill to the Judiciary Committee so that the bill could be rewritten to include either of two proposed amendments: (1) an elimination of the required background check, thereby making it an option for state and local officials, or (2) an assurance that the costs of the background checks would be fully funded by the federal government. *Id.*

105 H.R. REP. NO. 344, *supra* note 1, at 39 (additional dissenting view by Congressman Schiff), *reprinted in* 1993 U.S.C.C.A.N. at 2009.

106 *Id.*

107 18 U.S.C. § 922(s)(2) (Supp. V 1993).

108 *See supra* notes 24–25 and accompanying text.

109 18 U.S.C. § 922(s)(6)(B)(i) (Supp. V 1993).

110 18 U.S.C. § 922(s)(6)(C) (Supp. V 1993). Although 18 U.S.C. § 922(s)(7) insulates the CLEO from an action at law for civil damages, 18 U.S.C. § 925A provides an equitable remedy for erroneous denial of a firearm, whereby the injured individual, after

Under both provisions, the CLEO must fulfill the required duties, and in the recent controversies, the government has conceded that both the destruction of records provision and the explanation of reasons provision are mandatory, provided a background check is instituted.[111] Therefore, these provisions, coupled with the mandatory background check, require the CLEO to perform three separate mandatory tasks.

2. *Penalty Provisions*

Another concern rests in the applicability of the penalty provisions of the Brady Act to the CLEOs performing the background checks. Although the Brady Act explicitly exempts CLEOs from liability for civil damages,[112] the applicability of the criminal provision[113] of the Brady Act does not appear to exempt the CLEOs from criminal prosecution.[114] The construction of the criminal penalty provision clearly indicates its application to "whoever"

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exhausting the available administrative avenues, could seek rectification of the error through an action against the appropriate government agency.

[111] Printz v. United States, 854 F. Supp. 1503, 1511 (D. Mont. 1994).

[112] 18 U.S.C. § 922(s)(7) (Supp. V 1993).

> A chief law enforcement officer or other person responsible for providing criminal history background information pursuant to this subsection shall not be liable in an action at law for damages—A) for the failure to prevent the sale or transfer of a handgun to a person whose receipt or possession of the handgun is unlawful under this section; or B) for preventing such a sale or transfer to a person who may lawfully receive or possess a handgun.

Id.

[113] 18 U.S.C. § 924(a)(5) (Supp. V 1993). *See supra* text accompanying note 27.

[114] The district courts have split on whether or not the CLEOs are subject to the criminal penalties. Romero v. United States, 883 F. Supp. 1076, 1080 (W.D. La. 1995) (concluding Sheriff Romero has not presented the court with any evidence to suggest the U.S. Attorney intends to pursue criminal action against a CLEO not conducting background checks); Frank v. United States, 860 F. Supp. 1030, 1036 (D. Vt. 1994) (relying upon Memorandum for Janet Reno, Attorney General, from Walter Dellinger, Office of Legal Counsel, March 16, 1994, the court held the sheriff is not subject to the criminal penalties); Mack v. United States, 856 F. Supp. 1372, 1377 (D. Ariz. 1994) ("Under the plain meaning of the statute, Mack is under threat of criminal penalties . . . ."); McGee v. United States, 863 F. Supp. 321, 324 (S.D. Miss. 1994) (relying upon government's interpretation of the provision, the sheriff is not subject to criminal prosecution); Koog v. United States, 852 F. Supp. 1376, 1387 (W.D. Tex. 1994) (concluding that the provisions do not apply to the sheriffs); *Printz*, 854 F. Supp. at 1510 (concluding that the criminal penalty provision does not apply to CLEOs).

violates the Brady Act.[115] Deciphering the congressional intent behind the provision requires both an examination of the legislative history, as well as an analysis of the federal government's interpretation. The legislative history of the Brady Act shows that it underwent numerous amendments and drafts before the full Congress approved it.[116]

When Congress settled upon the five day waiting period and required reasonable effort on the part of the CLEOs, the legislative history did not evince any indication of whether the criminal provision would apply to CLEOs.[117] While the silence may lend support to the conclusion that Congress had no intent to apply the penalty provisions to the CLEOs, it is quite possible to consider the inaction by Congress as reinforcing the interpretation that the provision was intended to subject uncooperative CLEOs to criminal penalties.

Additionally, the Brady Act's specific exemption of CLEOs from civil damages resulting from the improper execution of the background check procedures[118] does not imply Congress expected to relieve the CLEOs of criminal responsibility. The two provisions are quite different, with the civil damages provision insulating the CLEO from suits in defamation, negligence, and other civil injuries when they conduct the mandatory background checks, whereas the criminal provision appears to unequivocally enforce compliance with the implementation of the Brady Act itself. Since these two provisions obviously are enacted with two separate purposes, an argument that the exemption expressed in one section necessarily implies an exemption in another is entirely incongruous with the purposes of the legislation. Without a criminal provision in place to coerce the CLEOs to conduct the background checks, the Brady Act becomes a statute with a lot of bark, but little bite, for the CLEOs can neglect their responsibilities under the statute without fear of reprisal from the federal government.

While many of the district courts faced with the recent Brady Act challenges have followed the policy of construing an ambiguous statute in such a manner to avoid constitutional problems unless the construction is plainly contrary to the intent of Congress,[119] the intent in the criminal provision of the

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[115] 18 U.S.C. § 924(a)(5) (Supp. V 1993). *See supra* note 27.

[116] An earlier version of the Brady Act, which was passed in the House of Representatives but never enacted, included the criminal penalty provision; however, it did not require the CLEOs to conduct a reasonable effort in the background check. 137 CONG. REC H11,692 (1991).

[117] 18 U.S.C. § 922(s) (Supp. V 1993).

[118] 18 U.S.C. § 922(s)(7) (Supp. V 1993).

[119] *See* Romero v. United States, 883 F. Supp. 1076 (W.D. La. 1995); Frank v. United States, 860 F. Supp. 1030 (D.Vt. 1994); Mack v. United States, 856 F. Supp. 1372 (D. Ariz. 1994); McGee v. United States, 863 F. Supp. 321 (S.D. Miss. 1994); Koog v.

Brady Act is far from ambiguous.[120] While the rule of leniency requires that a penal statute be construed strictly against the government,[121] the meaning of the term "whoever" within the penalty provision is quite clear and should not be misapplied so that the CLEOs are exempt from its expectations.[122] Therefore, exempting the CLEOs from the penalty statute flouts the plain meaning of the language.[123]

The second source of consideration lies within the federal government's interpretation of the statute. The Assistant Attorney General for the Office of Legal Counsel, Walter Dellinger, stated "[i]t would be difficult to prosecute a CLEO for failing to make 'a reasonable effort,' and such a prosecution would be subject to a Fifth Amendment due process challenge."[124] Although the Justice Department has interpreted the statute so that criminal prosecution would present difficult challenges, an agency's interpretation is entitled to deference only when the statute is ambiguous on the matter at issue.[125] As previously developed, the Brady Act's usage of the term "whoever" does lend

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United States, 852 F. Supp. 1376 (W.D. Tex. 1994); Printz v. United States, 854 F. Supp. 1503 (D. Mont. 1994); *see also* DeBartolo v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

[120] In footnote 5 of its opinion, the *Mack* court summed up the issue of ambiguity quite well.

> Assuming for the sake of argument that the term ["whoever"] lacks clarity, several interlocking principles guide . . . [the] construction to the identical result. First, a statute must be construed, if fairly possible, to avoid constitutional problems. If ambiguous, the more lenient construction in favor of a criminal defendant is required. It is only if the language is unclear that the Court need refer to legislative history as an aid to statutory interpretation.

Mack, 856 F. Supp. at 1377 n.5 (citations omitted).

[121] *See* United States v. Thompson/Center Arms Co., 504 U.S. 505, 517 (1992); Bussic v. United States, 446 U.S. 398, 406 (1980); United States v. Bass, 404 U.S. 336, 348 (1972).

[122] "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Chevron U.S.A. Inc. v. National Resources Defense Council, Inc., 467 U.S. 837, 842–43 (1984).

[123] "[A]s long as the statutory scheme is coherent and consistent, there is generally no need for court to inquire beyond the plain language of the statute." United States v. Ron Pair Enters., Inc., 489 U.S. 235, 240–41 (1989).

[124] Op. Off. Legal Counsel (March 16, 1994).

[125] *Chevron*, 467 U.S. at 842–43. Under *Chevron*, it is "unclear whether an agency's interpretation of a criminal statute is entitled to deference." United States v. Douglas, 974 F.2d 1046, 1048 n.1 (9th Cir. 1992).

itself to a plain meaning, and since courts are the final authorities on issues of statutory construction,[126] the courts should not be obligated to heed to the interpretations of the Justice Department.[127] The Justice Department's present refusal to proceed with the possible criminal prosecutions of CLEOs does not preempt the department from reversing its stance and pursuing criminal charges against violating CLEOs in the future. Regardless of the Department's stance, the law remains unaltered on the books. Therefore, while the Justice Department's interpretation may be persuasive, it is not controlling.

Through the penalty provision and the three mandated tasks required of CLEOs, the Brady Act clearly mandates action on the part of local and state officials. Within the structure of the Brady Act, they are given no opportunity to avoid the implications of the Act, and therefore, it is suspect under the Supreme Court's recent Tenth Amendment jurisprudence in *New York v. United States.*[128]

B. *Do the Background Check Provisions Violate the Tenth Amendment?*

In *New York*, the Court determined that Congress did have the power to offer the states a legitimate choice rather than issuing an unavoidable command,[129] for "[t]he Federal Government may not *compel* the states to enact or administer a federal regulatory program."[130] Instead, through cooperative federalism,[131] Congress could work with the state governments in a noncompulsory fashion in order to achieve a mutual goal. However, if Congress did not want the possibility of incomplete enactment of its legislation, it could preempt state power and undertake the regulation without the involvement of the state.[132] "The Constitution . . . gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation."[133] Therefore, if Congress believes it is essential that it regulate a

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[126] INS v. Cardoza-Fonseca, 480 U.S. 421, 447 (1987).

[127] Although, since the Justice Department did not raise this issue in the present actions, it would be estopped from doing so on appeal. McGee v. United States, 863 F. Supp. 321, 324 n.3 (S.D. Miss. 1994).

[128] 505 U.S. 144 (1992).

[129] *Id.* at 184-85. The Court has recognized the validity of cooperative federalism rather than compelled compliance. Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 289 (1981).

[130] *New York*, 505 U.S. at 188 (emphasis added).

[131] *Hodel*, 452 U.S. at 289.

[132] *New York*, 505 U.S. at 177-79.

[133] *Id.* at 178. Congress exercised this power to some extent through the exemption of states with their own programs for background checks of handgun purchasers, provided that

particular area, it may directly do so without infringing upon the powers reserved to the states through the Tenth Amendment.

When Congress imposes direct and uncompromising legislation onto the states, questions arise regarding the methods Congress uses to achieve a particular end. "'[The Supreme] Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations.'"[134] Although, as previously discussed, Congress can implement persuasive and preemptory legislation[135] without violating the Tenth Amendment, legislation which requires mandatory compliance without any possible alternatives violates the principles of state sovereignty.[136]

As a result of the mandatory nature of the Brady Act in regards to the CLEOs' duties, the Act is quite similar to the "take title" provision of the Low-Level Radioactive Waste Policy Act scrutinized in *New York*.[137] Due to the mandatory nature of the Brady Act, Congress has conscripted state and local officials into implementing federal legislation developed to achieve the federal government's desired end.[138] In *New York*, the federal government required state legislatures to regulate in a particular area, yet under the Brady Act, the federal government has bypassed the state legislature and has directly commanded the CLEOs to directly fulfill the federal objectives. The Brady Act moves beyond simply requiring action by the state legislature, as expressed in the unconstitutional "take title" provision of *New York*, and actually impresses the local officials into service, thereby dismissing any possibility of the Brady Act acting as a law of general applicability among both states and private

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the programs comply with the timetables of the Attorney General. If the program does not comply with the requirements, the state's program will be pre-empted by the federal plan. H.R. REP. NO. 344, *supra* note 1, at 10–11, *reprinted in* 1993 U.S.C.C.A.N. at 1987.

[134] *New York*, 505 U.S. at 161 (quoting FERC v. Mississippi, 456 U.S. 742, 761-62 (1982)).

[135] *See supra* text accompanying note 72.

[136] *See supra* text accompanying note 73.

[137] *Id.*

[138] In *FERC*, the Court held that the Mississippi Public Service Commission could be compelled to adjudicate disputes arising under a federal statute because the Commission was part of the state adjudicatory body, but did not require the states to adopt a legislative program. 456 U.S. at 768–71. Under the Court's holding in Testa v. Katt, 330 U.S. 386, 394 (1947), which stated that the federal government can direct the state governments to do the type of activity in which the state governments ordinarily engage, supports *FERC*'s holding because adjudicatory procedures are ordinary state functions. Under the Brady Act, the CLEOs, for the most part (some states may require that the CLEOs conduct background checks), are being asked to do an activity that they do not do in the course of their normal activities; therefore, Congress can not expect that the Brady Act simply direct the CLEOs to fulfill obligations they already have under state and local law as permitted in *Testa*.

entities.[139] Congress has stepped beyond forcing state governments to legislate, and instead, has effectively skipped the middle man and imposed its own legislation on state and local officials.[140] Without a viable option of discretion for the CLEOs, "Congress has crossed the line distinguishing encouragement from coercion."[141]

Diminished accountability[142] is another undesired result of the Brady Act, for "where the Federal Government compels States to regulate, the accountability of both the state and federal officials is diminished."[143] By placing the responsibility of the background check onto the CLEO, Congress has effectively insulated itself from the unpopular decisions by forcing the CLEO to act as the front line administrator of the Brady Act.[144] While some CLEOs are appointed to their positions and thus partially insulated from the repercussions of the unpopularity of the decisions, a vast number are directly elected, and therefore, will suffer from voter disapproval which could result in the loss of their positions even though they are completely unable to avoid their duties under the Brady Act.[145] Additionally, the Brady Act's minimum threshold for background checks will demand allocation of the CLEOs' precious few resources, thus resulting in the possible neglect of the official duties of the officers.[146] As a result of decreased services resulting from the impact of the background checks on the fiscal budget of the law enforcement agency, responsibility for the problems will be blamed upon the CLEO, who might face losses in the election due to voter perception that the CLEO is inefficient with the tax revenue.[147] Finally, with the local officials suffering the brunt of the voter disapproval of the effects of the Brady Act, Congress may receive praise and acknowledgment for effectively attacking an issue of extreme importance; however, it will avoid the consequences of the undesirable costs and impacts on the citizens.[148]

In sum, the actions required under the Brady Act require a CLEO to

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[139] Unlike the legislation scrutinized in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), the Fair Labor Standards Act, which was generally applicable to both state and private entities, the Brady Act targets the state governments specifically without any regard to private actors.

[140] Frank v. United States, 860 F. Supp. 1030, 1042-43 (D. Vt. 1994).

[141] New York v. United States, 505 U.S. 144, 175 (1992).

[142] *See supra* text accompanying notes 74–75.

[143] *New York*, 505 U.S. at 168.

[144] *See supra* text accompanying note 75.

[145] *Id.*

[146] *See* Printz v. United States, 854 F. Supp. 1503, 1515 (D. Mont. 1994).

[147] *Id.*

[148] *Id.*

conduct three mandatory tasks, as well as remain subject to criminal liability should the Justice Department reverse its opinion on the criminal provisions of the Act. Under the mandatory structure of the Brady Act, Congress has "commandeered" the CLEOs to implement federal legislation without providing them with any other viable options. Additionally, the federal government has not provided any funding for the background check procedures, thus forcing the CLEOs and local governments to bear the financial burden of a program they may not necessarily wish to administer. Without providing an opportunity to choose not to participate in the federal legislation, the Brady Act violates the Tenth Amendment through its intrusion into powers reserved entirely for the state government.[149]

C. *Are the Unconstitutional Provisions Severable from the Rest of the Statute?*

The Brady Act presents the American public with a commendable attempt at regulating handgun purchases. However, no matter how noble the cause of the legislation, poor draftsmanship which results in a violation of the Constitution cannot be overlooked. Therefore, when analyzing a statute, a court must consider whether the unconstitutional provision can be severed from the statute, permitting the remaining portion to survive.

> "The standard for determining the severability of an unconstitutional provision is well established: Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as law."[150]

Within the Gun Control Act, Congress drafted a severability clause.[151] The Brady Act was written as an amendment to the Gun Control Act, and as a result, the severability clause directly applies to the Brady Act. Under the Supreme Court's holding in *Alaska Airlines, Inc. v. Brock*,[152] if the statute contains a severability clause, there is a presumption that Congress did not

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[149] Romero v. United States, 883 F. Supp. 1076, 1087 (W.D. La. 1995); Frank v. United States, 860 F. Supp. 1030, 1043 (D. Vt. 1994); Mack v. United States, 856 F. Supp. 1372, 1380 (D. Ariz. 1994); McGee v. United States, 863 F. Supp. 321, 327 (S.D. Miss. 1994); *Printz*, 854 F. Supp. at 1517.

[150] New York v. United States, 505 U.S. 144, 186 (1992) (quoting Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987)).

[151] 18 U.S.C. § 928 (Supp. IV 1965–1968) ("If any provision of [the Gun Control Act] is held invalid, the remainder of the chapter . . . shall not be affected thereby.").

[152] 480 U.S. 678 (1987).

intend the validity of the entire statute to be dependent upon the constitutionality of the suspect provision.[153] Analysis of the Brady Act in its entirety indicates that while the background check was an important provision, it was not the sole purpose of the Act. Rather, the Brady Act without the background check will continue to require the five day waiting period,[154] the requirement that sellers transmit certain information to the proper authorities,[155] the future implementation of the national instant background check system,[156] and the option of the CLEOs to conduct a background check.[157] Although the background check will be at the option of the CLEOs, the balance of the Brady Act remains fully operational, and therefore, severing the mandatory language out of the statute will not render the remainder of the statute dysfunctional.

V. CONCLUSION

The recent challenges to the Brady Act highlight the debate about unfunded federal mandates. The lessons of the district court decisions should serve to remind Congress that the states and their citizens will not remain silent in the wake of legislation with which they do not agree nor wish to pay for. As developed within this Note, the Tenth Amendment jurisprudence is anything but clear; however, the recent decision in *New York v. United States* represents the Court's latest word on the Amendment. Through the decision, the Court communicated to the lower courts that federal intrusion into state sovereignty is subject to a limitation. The lower courts have been instructed to look at the questionable legislation and determine the methodology used by the federal government in achieving its ends. If the legislative mechanism does not allow the state and local governments to exercise their discretion regarding whether or not to comply with the legislation, it is constitutionally suspect and should be examined carefully. The Supreme Court's Tenth Amendment jurisprudence, while understandably confusing to apply, does not simply represent a continuum on which the lower courts are supposed to fit in the controversy before them.[158] Rather, the Court has established complex guidelines with

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[153] *Id.* at 686.

[154] 18 U.S.C. § 922(s)(1)(A)(ii)(I) (Supp. V 1993).

[155] 18 U.S.C. § 922(s)(1)(A)(i)(I)-(IV) (Supp. V 1993).

[156] 18 U.S.C. § 922(t)(1) (Supp. V 1993).

[157] 18 U.S.C. § 922(s)(2) (Supp. V 1993). While the mandatory nature of the Brady Act interferes with the sovereignty of states protected under the Tenth Amendment, most CLEOs will find it in their best interest to conduct the background check, thus fulfilling the original intentions of the Brady Act.

[158] Koog v. United States, 852 F. Supp. 1376, 1381 (W.D. Tex. 1994). The court did

which the lower court should examine the legislation and determine its constitutionality. The Brady Act's mandatory provisions exceed the powers granted to Congress and invade state sovereignty protected by the Tenth Amendment. Therefore, the decisions of the district courts holding the Brady Act unconstitutional should be affirmed.

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not accept a broad reading of the *New York* decision, and it held that the duties the federal government imposed upon the law enforcement officers were minimal duties similar to those permitted in FERC v. Mississippi, 456 U.S. 742 (1982). However, the court failed to understand the difference between the Brady Act and the legislation under scrutiny in *FERC*. The utility regulatory commission in *FERC* was afforded the option to decline to follow the federal legislation provided they at least consider it. On the contrary, the Brady Act provides no options or discretion and instead mandates the CLEOs to follow its directives or become subject to penalties. As a result, the court's decision that the Brady Act's background check requirements were constitutional seriously misconstrues the Supreme Court's present interpretation of the Tenth Amendment.